

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

CARLTON W DONNELLY,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-13597

Trial Case No. 3AN-11-13926CR

**MOTION FOR NON-ROUTINE EXTENSION OF TIME TO FILE APPELLANT'S
OPENING BRIEF**

VRA AND APP. R. 513.5 CERTIFICATION

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court. I further certify, pursuant to App. R. 513.5, that the font used in this document is Arial 12.5 point.

Carlton Donnelly moves this court for an extension of time to file Appellant's opening brief, as follows:

- a) The opening brief is due on November 5, 2021.
- b) The opening brief was first due on May 14, 2020. Previous extensions totaling 540 days have been requested and granted.
- c) The length of the requested extension is 55 days until December 30, 2021.
- d) The reasons an extension are necessary are set out in the attached affidavit.
- e) Appellant's counsel has been diligent as set out in the attached affidavit.

f) Counsel communicated with Diane Wendlandt (OCA), and the state does opposes this motion.

This motion is supported by the attached affidavit of counsel.

ALASKA PUBLIC DEFENDER AGENCY

DATE September 27, 2021

/s/ Sharon Barr
SHARON BARR (9106024)
ASSISTANT PUBLIC DEFENDER

attorneys for about five weeks spanning July. The Agency, therefore, needed staff attorneys to go to Ketchikan for a week at a time to work there and keep things moving forward until the three new staff attorneys could start in early August. I worked in Ketchikan the week of July 19; I was handling Ketchikan trial cases full time during that week. I had no time to work on my appellate cases.

4. Prior to going to Ketchikan the week of July 19, I started working on the appeal of *Sadowski v. State*, A-13445. This is an appeal of a first-degree murder conviction. There are 1,467 pages of trial transcript. Mr. Sadowski received a sentence of 90 years to serve.

5. On July 26, when I returned to work in Anchorage from my week working in Ketchikan, I was assigned an expedited CINA appeal, *G.T. v. State*, S-18115. I had to put aside my work in *Sadowski* to work on G.T. I filed a reply brief in *Fawcett v. State*, A-13433 on August 10. I had annual leave the week of August 16-20.

6. I filed the opening brief in *G.T. v. State*, S-18115 on September 3. September 6 was a holiday. After filing *G.T.*, I resumed work on *Sadowski*.

7. Part of the work of the appellate unit includes editing the work of other staff attorneys and contract attorneys, and assisting fellow staff attorneys to prepare for oral argument. This, as well as discussing cases and legal issues with trial attorneys, takes up a portion of my workload.

8. Part of my job duties is to run the Agency's intern/extern program. In this capacity, I hire a handful of student interns/externs during the traditional academic year, and 20-24 interns/externs each summer. From late August through

January this can take up a significant amount of my time. I have been extremely busy with interviewing and hiring interns since late August. I estimate it has taken up close to half of my work time in September, and I predict it will continue to be very time consuming over the next few months.

9. I had annual leave on September 10 and 17. I attended the Alaska Bar conference on September 13 and half of the work day of September 14. *Sadowski* is due on October 15 and I am worried whether I will be able to file it on time. I may need an extra week to work on it. October 18 is a state holiday. October 21 through 23 I will be representing the Agency at the virtual Equal Justice Works job fair, where I will be interviewing students for internships. I may be taking annual leave for all or part of November 1 through 5, and I am on annual leave from November 19 through 26.

10. This case is complex in that it is tied to Mr. Donnelly's other appeal, A-13598. This case has approximately 968 pages of transcript. (This is approximate because the transcript of the jury trial end at page 844 and the sentencing transcript begins at page 1171 and it is not clear why this is so.) The trial transcript lists both this case and A-13597, although it appears that A-13597 trial dates were different. Both cases were consolidated for sentencing. Case. A-13597 has approximately 957 pages of transcript. (This is approximate because the transcript of the jury trial ends at page 833 and the sentencing transcript begins at page 1171 and it is not clear why this is so.) Together the two cases have approximately 1925 pages of transcript, although 124 of those pages are a combined sentence appeal.

11. Because these cases were consolidated for sentencing, and may be tied together in other ways, I need to read the transcripts in both cases, and review the records in both cases, so that I can determine whether the cases need to be consolidated for appeal. After I make that decision, I can then begin researching and drafting either a single consolidated appeal, or separately work on each appeal.

12. Because I need to review both cases before I start working on either of them, I am asking that both this case and case A-13597 have a due date of December 30, 2021. I will do my best to get these cases briefed by that date. I take no joy from extending due dates or from drafting these affidavits. Though I will do my best, as I am unsure whether these will be one or two appeals, it's possible that I will need more time.

13. I communicated with Diane Wendlandt (OCA), and she opposes this motion.

14. This affidavit is electronically signed under penalty of perjury.

/s/ Sharon Barr
SHARON BARR (9106024)
ASSISTANT PUBLIC DEFENDER

I certify that on September 27, 2021 a copy of this document and its attachments was emailed to:
Diane Wendlandt (OCA)

By: SB

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

CARLTON W DONNELLY,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-13598

Trial Case No. 3AN-14-08520CR

**MOTION FOR NON-ROUTINE EXTENSION OF TIME TO FILE APPELLANT'S
OPENING BRIEF**

VRA AND APP. R. 513.5 CERTIFICATION

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court. I further certify, pursuant to App. R. 513.5, that the font used in this document is Arial 12.5 point.

Carlton Donnelly moves this court for an extension of time to file Appellant's opening brief, as follows:

- a) The opening brief is due on September 27, 2021.
- b) The opening brief was first due on June 5, 2020. Previous extensions totalling 481 days have been requested and granted.
- c) The length of the requested extension is 94 days until December 30, 2021.
- d) The reasons an extension are necessary are set out in the attached affidavit.
- e) Appellant's counsel has been diligent as set out in the attached affidavit.

Alaska Public Defender Agency
Sharon Barr • sharon.barr@alaska.gov
900 West 5th Avenue, Suite 101 • Anchorage, AK 99501
Phone: (907) 334-4461 • Fax: (907) 334-4440
Service: doa.pda.appeals.pleading@alaska.gov

f) Counsel communicated with Diane Wendlandt (OCA), and the state opposes this motion.

This motion is supported by the attached affidavit of counsel.

ALASKA PUBLIC DEFENDER AGENCY

DATE September 27, 2021

/s/ Sharon Barr
SHARON BARR (9106024)
ASSISTANT PUBLIC DEFENDER

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CARLTON W DONNELLY,

Appellant,

v.

STATE OF ALASKA,

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Court of Appeals No. A-13598

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AFFIDAVIT OF COUNSEL

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STATE OF ALASKA)
) ss
THIRD JUDICIAL DISTRICT)

Sharon Barr swears:

1. I am the attorney assigned to represent the appellant in the above-entitled case.

2. I need an extension of 94 days days because I entered my appearance on this case on June 29, 2021. I also entered my appearance on Mr. Donnelly's other criminal appeal, A-13597 on that date.

3. I filed a reply brief in *L.C. v. State*, S-18002 on July 1. July 5 was a holiday. I took annual leave on July 9 and 12. On July 15 I filed an opening brief in *DeSimone v. State*, A-13515. This is an appeal of a first-degree murder conviction and there are 1837 pages of trial transcript. Our Ketchikan office had no staff

1
2 attorneys for about five weeks spanning July. The Agency, therefore, needed staff
3 attorneys to go to Ketchikan for a week at a time to work there and keep things
4 moving forward until the three new staff attorneys could start in early August. I
5 worked in Ketchikan the week of July 19; I was handling Ketchikan trial cases full
6 time during that week. I had no time to work on my appellate cases.

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8 4. Prior to going to Ketchikan the week of July 19, I started working on the
9 appeal of *Sadowski v. State*, A-13445. This is an appeal of a first-degree murder
10 conviction. There are 1,467 pages of trial transcript. Mr. Sadowski received a
11 sentence of 90 years to serve.

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13 5. On July 26, when I returned to work in Anchorage from my week
14 working in Ketchikan, I was assigned an expedited CINA appeal, *G.T. v. State*, S-
15 18115. I had to put aside my work in *Sadowski* to work on G.T. I filed a reply brief in
16 *Fawcett v. State*, A-13433 on August 10. I had annual leave the week of August 16-
17 20.

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19 6. I filed the opening brief in *G.T. v. State*, S-18115 on September 3.
20 September 6 was a holiday. After filing *G.T.*, I resumed work on *Sadowski*.

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22 7. Part of the work of the appellate unit includes editing the work of other
23 staff attorneys and contract attorneys, and assisting fellow staff attorneys to prepare
24 for oral argument. This, as well as discussing cases and legal issues with trial
25 attorneys, takes up a portion of my workload.

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27 8. Part of my job duties is to run the Agency's intern/extern program. In
28 this capacity, I hire a handful of student interns/externs during the traditional
academic year, and 20-24 interns/externs each summer. From late August through

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2 January this can take up a significant amount of my time. I have been extremely busy
3 with interviewing and hiring interns since late August. I estimate it has taken up close
4 to half of my work time in September, and I predict it will continue to be very time
5 consuming over the next few months.
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7 9. I had annual leave on September 10 and 17. I attended the Alaska Bar
8 conference on September 13 and half of the work day of September 14. *Sadowski*
9 is due on October 15 and I am worried whether I will be able to file it on time. I may
10 need an extra week to work on it. October 18 is a state holiday. October 21 through
11 23 I will be representing the Agency at the virtual Equal Justice Works job fair, where
12 I will be interviewing students for internships. I may be taking annual leave for all or
13 part of November 1 through 5, and I am on annual leave from November 19 through
14 26.
15

16 10. This case is complex in that it is tied to Mr. Donnelly's other appeal, A-
17 13597. This case has approximately 957 pages of transcript. (This is approximate
18 because the transcript of the jury trial end at page 833 and the sentencing transcript
19 begins at page 1171 and it is not clear why this is so.) The trial transcript lists both
20 this case and A-13597, although it appears that A-13597 trial dates were different.
21 Both cases were consolidated for sentencing. Case. A-13597 has approximately 968
22 pages of transcript. (This is approximate because the transcript of the jury trial ends
23 at page 844 and the sentencing transcript begins at page 1171 and it is not clear
24 why this is so.) Together the two cases have approximately 1925 pages of transcript,
25 although 124 of those pages are a combined sentence appeal.
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11. Because these cases were consolidated for sentencing, and may be tied together in other ways, I need to read the transcripts in both cases, and review the records in both cases, so that I can determine whether the cases need to be consolidated for appeal. After I make that decision, I can then begin researching and drafting either a single consolidated appeal, or separately work on each appeal.

12. Because I need to review both cases before I start working on either of them, I am asking that both this case and case A-13597 have a due date of December 30, 2021. I will do my best to get these cases briefed by that date. I take no joy from extending due dates or from drafting these affidavits. Though I will do my best, as I am unsure whether these will be one or two appeals, it's possible that I will need more time.

13. I communicated with Diane Wendlandt (OCA), and she opposes this motion.

14. This affidavit is electronically signed under penalty of perjury.

/s/ Sharon Barr
SHARON BARR (9106024)
ASSISTANT PUBLIC DEFENDER

I certify that on September 27, 2021 a copy of this document and its attachments was emailed to: Diane Wendlandt (OCA) By: SB

In the Court of Appeals of the State of Alaska

Carlton William Donnelly,
Appellant,

v.

State of Alaska,
Appellee.

Court of Appeals No. **A-13598**

Order

Date of Order: **October 1, 2021**

Trial Court Case No. **3AN-14-08520CR**

Before: Wollenberg, Harbison, and Terrell, Judges

Carlton William Donnelly is appealing his convictions for third-degree assault, second- and fourth-degree misconduct involving a controlled substance, and failure to stop at the direction of a peace officer. Through his attorney, the Public Defender Agency, Donnelly previously received two extensions of time to file the opening brief in this case.

Donnelly initially requested, and received, a full 390-day extension under Standing Order No. 12.

At the expiration of this time, Donnelly requested an additional extension of 128 days. In that extension request, the supervising attorney of the Agency's appellate section, Deputy Public Defender Renee McFarland, stated that Mr. Donnelly's case was number 6 on the Agency's assignment list and that she had not yet assigned the case to an attorney for briefing. She explained, however, that she had identified a possible attorney to whom she would assign the case, and that her requested extension was intended to allow the assigned attorney to meet the briefing deadline without the need to request an additional extension. The assigned attorney, Assistant Public Defender Sharon Barr, entered an appearance the following day.

We partially denied the requested extension, stating that it did “not comply with the mandates of Standing Order No. 12.” We expressed particular concern that, at the time of the extension request, the case had not yet been assigned, and we clarified that “the resource shortages at the Public Defender Agency are not ‘extraordinary and unforeseeable circumstances’ justifying an extension of time beyond the limit of Standing Order No. 12.” We recognized, however, that we had previously granted non-routine extension requests based on similar information, and we accordingly granted a 90-day extension (until September 27, 2021). We stated, however, that “[n]o further extensions based solely on the ordinary press of business will be granted in this case.”

On September 27, 2021 — the due date for the opening brief in this case — Ms. Barr moved for another extension of time to file the opening brief. In particular, Ms. Barr seeks an extension of time until December 30, 2021 — an additional 94 days. If the Court grants this request, the time for filing the opening brief in this case will be extended 574 days — significantly beyond the 390-day limit set out in Standing Order No. 12 (and beyond the extraordinary extension previously requested and denied in part).

In the affidavit accompanying the extension request, Ms. Barr documents the briefs she has filed and the cases she is working on, as well as her various other work-related responsibilities. We do not question Ms. Barr’s diligence in working on her cases. But it is clear from Ms. Barr’s affidavit that little, if any, work has been done on this appeal, notwithstanding Ms. McFarland’s assertion that her request for an extraordinary extension time in unassigned cases is intended to account for the time it will ultimately take the assigned attorney to complete the opening brief.

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October 1, 2021

We are also concerned that appellate attorneys with cases beyond the Standing Order No. 12 limit are being asked to perform duties outside of the appellate unit with no apparent accounting for the effect of these duties on the briefing deadlines set by the Court. For example, Ms. Barr explains that she spent a week in Ketchikan covering trial court hearings due to the absence of any staff attorney coverage in the Agency's Ketchikan office — and that during that week, she had no time to work on appellate cases. But as we stated in our previous order, the resource shortages at the Agency do not constitute “extraordinary and unforeseeable circumstances” justifying an extension of time beyond the Standing Order No. 12 limit.

That said, Ms. Barr explains in her affidavit that Mr. Donnelly has another case pending appeal — and that his two cases were consolidated for sentencing and may be tied together in ways that require her to review both cases together. We understand the reasons why such a review may be important. We will therefore extend the due date in this case to match the current due date in Mr. Donnelly's other pending appeal, File No. A-13597.

Accordingly, the motion for a non-routine extension of time to file the appellant's opening brief is **DENIED IN PART**. The opening brief in this case is due on or before **November 5, 2021**.

Entered at the direction of the Court.

Donnelly v. State - p. 4
File No. A-13598
October 1, 2021

Clerk of the Appellate Courts

A handwritten signature in black ink, appearing to read 'Kaitlin D'Eimon', written over a horizontal line.

Kaitlin D'Eimon, Deputy Clerk

cc: Court of Appeals Judges
Distribution:

Email:
Barr, Sharon, Public Defender
Wendlandt, Diane L.

In the Court of Appeals of the State of Alaska

Carlton William Donnelly,
Appellant,

v.

State of Alaska,
Appellee.

Court of Appeals No. **A-13597**

Order

Date of Order: **October 1, 2021**

Trial Court Case No. **3AN-11-13926CR**

Before: Wollenberg, Harbison, and Terrell, Judges

Carlton William Donnelly is appealing his convictions for misconduct involving a controlled substance and misconduct involving a weapon. Through his attorney, the Public Defender Agency, Donnelly previously received two extensions of time to file the opening brief in this case.

Donnelly initially requested, and received, a full 390-day extension under Standing Order No. 12.

At the expiration of this time in early June 2021, Donnelly requested an additional extension of 150 days. In that extension request, the supervising attorney of the appellate section at the Public Defender Agency, Deputy Public Defender Renee McFarland, stated that Mr. Donnelly's case was number 8 on the Agency's assignment list, and that she had not yet assigned the case. She explained, however, that her requested extension was intended to allow the assigned attorney to work on the case without undue delay and thus be able to meet the briefing deadline without the need to request an additional extension. This Court granted the lengthy extension request (until November 5, 2021), finding that extraordinary circumstances justified the extension of time.

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October 1, 2021

Two weeks later, Assistant Public Defender Sharon Barr entered her appearance in this appeal.

Ms. Barr has now moved for another extension of time to file the opening brief. In particular, Ms. Barr seeks an extension of time from November 5 until December 30, 2021 — an additional 55 days. If the Court grants this request, the time for filing the opening brief in this case will be extended 595 days — significantly beyond the 390-day limit set out in Standing Order No. 12.

Notwithstanding the length of time this case has been pending, it is clear from Ms. Barr’s affidavit that little, if any, work has been done on this appeal. When Ms. McFarland requested a 150-day extension in June 2021, she stated that her intent was to ask for an extension that would allow the assigned attorney to work on, and complete, the opening brief without the need to request an additional extension. But — while we have recognized in several recent orders (including a July 15, 2021 order in Mr. Donnelly’s other appeal, File No. A-13598) that an extension request made when the appeal has not yet been assigned is, at best, only a guess as to when the opening brief would be filed — the clear expectation in the last request (and our expectation in granting it) was that the opening brief would be actively worked on during the 150-day period.

As of today, that apparently has not occurred, primarily due to competing work responsibilities. While we do not question Ms. Barr’s diligence in working on her cases, the ordinary press of business and resource shortages at the Public Defender Agency are not “extraordinary and unforeseeable circumstances” justifying an extension

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File No. A-13597
October 1, 2021

of time beyond the limit of Standing Order No. 12.

Given the significant length of time this case has been pending, we decline to grant the requested extension of time.

Accordingly, the motion for a non-routine extension of time to file the appellant's opening brief is **DENIED**. The opening brief in this case remains due on or before **November 5, 2021**.

Entered at the direction of the Court.

Clerk of the Appellate Courts

A handwritten signature in black ink, appearing to read 'Kaitlin D'Eimon', written over a horizontal line.

Kaitlin D'Eimon, Deputy Clerk

cc: Court of Appeals Judges

Distribution:

Email:
Barr, Sharon, Public Defender
Wendlandt, Diane L.

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

CARLTON W DONNELLY,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-13597 & A-13598

Trial Case No. 3AN-11-13926CR &
3AN-14-08520CR

MOTION TO PERMIT WITHDRAWAL AND FOR APPOINTMENT OF CONFLICT-FREE COUNSEL

VRA AND APP. R. 513.5 CERTIFICATION

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court. I further certify, pursuant to App. R. 513.5, that the font used in this document is Arial 12.5 point.

This court has denied Assistant Public Defender Sharon Barr's request for a nonroutine extension of time, imposing a deadline of November 5, 2021, for filing the opening briefs in these cases. For the reasons explained below, the Alaska Public Defender Agency cannot comply with the deadline ordered by this court and fulfill its ethical responsibilities to Carlton Donnelly and its other clients. Accordingly, if this court will not grant Ms. Barr's request, the agency moves to withdraw from Mr. Donnelly's cases and asks this court to appoint Mr. Donnelly conflict-free counsel to represent him in these appeals.

BACKGROUND

A. An Overview of the Agency's Appellate Backlog

In 2014, this court established a schedule of briefing extension limits that prescribed the maximum amount of time that will normally be allowed for a brief.¹ In the appendix to that order, this court detailed the length of time it was taking to brief a felony appeal, and it described the harm created by excessive appellate delay.² This court stated that it “owes a duty to all of these people, and a duty to the public at large, to maintain the health and effectiveness of the criminal justice system.”³ In furtherance of that duty, this court explained, it would “no longer grant any briefing extensions beyond the deadlines set forth in this schedule, absent truly extraordinary circumstances.”⁴ The limits prescribed in the order could be relaxed, this court stated, but “only for extraordinary circumstances.”⁵

¹ See Letter from Alaska Court of Appeals to Tracey Wollenberg, Kenneth Rosenstein, and Dan Bair (Jan. 22, 2014); see *also* Standing Order No. 12 – Relating to Extensions of Time for Filing Briefs in the Court of Appeals, Alaska Court of Appeals (Feb. 6, 2015).

² Appendix to Standing Order No. 12 – Court of Appeals Schedule of Briefing Extension Limits (Feb. 6, 2015) (“Our law guarantees a right of appeal to all criminal defendants, and there is no closure to a criminal case until the appeal is decided. Excessive appellate delay harms the interests of all the participants in the criminal justice system – not only the defendants and victims and their families, but also the police agencies who investigated the crime, and the community affected by the crime.”).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

Over the next two years, this court gradually reduced the amount of time authorized for the filing of an opening brief under Standing Order No. 12, from 530 days in 2014 to 390 days in 2016.⁶ The current limits provided in Standing Order No. 12 have been in effect since September 1, 2016.

In the years before the publication of Standing Order No. 12, the Alaska Public Defender Agency instituted a waiting list for criminal and postconviction cases awaiting an opening brief. The agency places cases on the list based on the order in which the transcripts are completed, and cases are generally assigned off the top, or near the top, of the list so that the agency can best maintain consistency and fairness in its assignment process.

According to snapshot data maintained by the agency, in 2014, the agency's appellate backlog totaled 129 cases.⁷ In 2015 and 2016, the backlog decreased to 87 and 76 cases, respectively, and by 2017, the agency had reduced its backlog to 17 cases.⁸ In the following years, however, reductions in funding for appellate contracts and appellate staffing increased the backlog – from 36 cases in

⁶ *Id.*

⁷ Letter from Deputy Public Defender Renee McFarland to Clerk of the Appellate Courts Meredith Montgomery (May 21, 2020) [hereinafter “Agency May 2020 Letter”].

⁸ *Id.*

2018 to 50 cases in 2019.⁹ By early 2020, the backlog had returned to over 120 cases.¹⁰

The large increase in the agency's backlog coincided with a period of transition in the agency. In April 2019, the Public Defender gave notice that he would resign. An acting public defender from outside the agency was appointed soon thereafter and served through the end of the fiscal year and until September 2019, when Public Defender Samantha Cherot was appointed.¹¹

When Ms. Cherot assumed the role as director, she inherited a number of challenges; in addition to the appellate backlog, the agency faced high trial caseloads, obstacles to recruitment and retention, and travel restrictions.¹² In March 2020, Ms. Cherot, who had worked many years at the agency but did not have experience in the agency's appellate section, appointed a new deputy public defender of the appellate section. The new deputy recognized the increased backlog

⁹ *Id.*

¹⁰ Letter from Deputy Public Defender Renee McFarland to Clerk of the Appellate Courts Meredith Montgomery (Mar. 24, 2020) [hereinafter "Agency March 2020 Letter"].

¹¹ James Brooks, *Dunleavy appoints Anchorage attorney as Alaska state public defender*, ANCHORAGE DAILY NEWS (Sept. 17, 2019).

¹² See Matt Buxton, *Alaska's criminal justice system has reached the brink of disaster after politicians ignored dire warnings*, THE MIDNIGHT SUN (Sept. 23, 2019); Kyle Hopkins and Nat Herz, *Judge: case of slain Mountain Village woman shows how Alaska's justice system is failing*, ANCHORAGE DAILY NEWS and ALASKA PUBLIC MEDIA (Sept. 18, 2019); see also PUBLIC DEFENDER AGENCY RESPONSE TO THE NOVEMBER 4, 2019, REVIEW OF THE EFFICIENCY & EFFECTIVENESS OF THE PUBLIC DEFENDER AGENCY (Dec. 23, 2019), *available at* doa.alaska.gov/drm/our/docs/pdareview-11-4-19.pdf.

1
2 as a primary problem facing the section and began working with Ms. Cherot to
3 address the problem.

4
5 That same month, the agency asked this court to increase the time
6 provided under Standing Order No. 12.¹³ It explained that the agency's appellate
7 section currently employed eight lawyers, two of which were new to appellate
8 practice, and five of whom, while experienced appellate lawyers, had requested
9 extensions beyond the maximum allowed by Standing Order No. 12. And it
10 described the section's workload – of the more than 120 criminal and postconviction
11 cases awaiting assignment, 45 had due dates in the next six months. The agency
12 asked this court to increase the maximum extension allowed by Standing Order No.
13 12 by 150 days to provide a “cushion for the expected, but unpredictable, matters –
14 bail appeals, petitions for review, petitions for hearing, and child-in-need-of-aid and
15 civil commitment appeals – that divert work away from opening briefs in criminal
16 cases.”¹⁴ The agency acknowledged the effect appellate delay has on the agency's
17 clients and the broader criminal legal system, and it restated its commitment to
18 reducing delay without sacrificing the quality of representation the agency provides
19 its appellate clients.¹⁵
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25

26 ¹³ Agency March 2020 Letter, *supra* note 10.

27 ¹⁴ *Id.*

28 ¹⁵ Agency May 2020 Letter, *supra* note 7.

This court rejected the agency’s request in June 2020.¹⁶ This court explained that increasing the maximum extension periods provided in Standing Order No. 12 would “not advance our common goal of reducing appellate delay,” and it determined that, notwithstanding “the budget and staffing shortfalls that state agencies are experiencing,” it “would not enlarge the time limits under Standing Order No. 12.”¹⁷ This court noted that for the agency to meet the existing time limits provided in Standing Order No. 12, the agency “must either return to full appellate staffing or greatly increase its use of contract appellate lawyers,” and it stated that “sustained understaffing of the appellate section is not extraordinary circumstance” justifying nonroutine extensions beyond the maximums provided by Standing Order No. 12.¹⁸

As detailed below, over the past 18 months, the agency has made significant, but nevertheless unsuccessful, efforts to comply with Standing Order No. 12’s existing limits. Since this court’s June 2020 refusal to extend those limits, the agency has increased its staffing, increased its productivity, and reduced its appellate backlog. In June 2020, the agency had eight permanent lawyers assigned to its appellate section; the agency now has ten permanent lawyers and is hiring an

¹⁶ Letter from Chief Judge Marjorie Allard, et al., to Samantha Cherot, et al. (June 8, 2020).

¹⁷ *Id.*

¹⁸ *Id.*

eleventh lawyer.¹⁹ The agency's total production increased by 27 percent between FY 2021 and FY 2020, and all categories in which the agency tracks production increased.²⁰ Despite the ongoing global pandemic, the agency's list of cases awaiting assignment has decreased from more than 120 cases in March 2020 to 85 cases in June 2020 to 52 cases today.²¹ In FY 2021, the agency assigned a total of 123 cases, including 50 cases to contractors, and it has assigned 32 cases, including 14 cases to contractors, since July 1, 2021.

Despite these efforts, the agency is currently unable to comply with Standing Order No. 12's existing time limits. As the agency explained to this court in June 2021, it had reduced the length of nonroutine extension requests in late 2020 and early 2021.²² But increasing obligations in the section's civil caseload has

¹⁹ Although the agency has increased its staffing, that staffing lacks significant criminal appellate experience. One new lawyer has civil appellate experience, but no criminal appellate experience; the other three new lawyers each have less than two years' appellate experience.

²⁰ The agency saw a 9 percent increase in the number of opening briefs filed in the court of appeals; a 21 percent increase in the number of opening briefs filed in the supreme court; a 39 percent increase in cases dismissed before an opening brief was filed; a 33 percent increase in reply briefs filed (this includes reply briefs filed in cases at the court of appeals and supreme court); a 250 percent increase in cases in which supplemental briefs were filed; and a 25 percent increase in the number of oral arguments. The agency also saw increased production in the number of petitions for review and hearing filed, by 900 percent and 6 percent, respectively.

²¹ There are an additional five cases awaiting transcripts; these cases will be placed on the waitlist once the record is complete.

²² See Letter from Renee McFarland to Alaska Court of Appeals (June 25, 2021).

1
2 stalled its progress in returning to compliance with Standing Order No. 12, and the
3 agency continues to require significant extensions in its criminal cases beyond that
4 provided by Standing Order No. 12.
5

6 Since January 1, 2021, the agency has assigned 24 child welfare
7 appeals to staff lawyers; it currently has three child welfare appeals awaiting
8 transcripts.²³ Moreover, many of the criminal cases ready for assignment to staff
9 lawyers require significant work, as they have long transcripts, involve serious
10 charges, and present complicated issues. Indeed, five of the six criminal cases
11 assigned to staff lawyers since July 1 have substantial records, increasing the work
12 associated with them – the combined transcripts and records in these cases range
13 from 1,993 pages to 3,824 pages. Both the agency's civil cases and the nature of
14 the criminal cases awaiting assignment has hindered the agency's progress in
15 reestablishing compliance with the limits established in Standing Order No. 12.
16
17

18 The agency has attempted to address its inability to meet Standing
19 Order No. 12's deadlines with contractors. But the agency's ability to comply with its
20 existing deadlines through the use of contractors is dependent on contractors'
21 availability. When the agency executed over 30 contracts at the end of FY 2021, the
22 majority of the agency's contractors could not accept cases with deadlines earlier
23
24

25 ²³ In that same period, the agency assigned seven civil commitment
26 appeals to staff lawyers, and there is one civil commitment appeal awaiting
27 assignment and one awaiting transcripts. The agency's contractors with the
28 experience to handle child welfare or civil commitment appeals do not have the
capacity to accept one of these cases at this time without seeking additional
nonroutine extensions in the agency's contracted criminal cases.

than 2022. The agency continues to use its contractors as they are available, but the combination of the agency's existing deadlines and its contractors' capacities has continued to require the agency request extensions beyond the limits provided in Standing Order No. 12.

Despite the agency's efforts over the past 18 months to reduce the appellate backlog from the level it reached in 2019 and 2020, it has not been able to do so within the existing limits of Standing Order No. 12. And it will likely remain unable to comply with Standing Order No. 12's existing deadlines for at least the next year and likely for the next two years. There are 15 cases with deadlines in 2021 awaiting assignment, and there are 23 cases with deadlines between January and June 2022. Even with the agency's increased production and additional use of contractors, the agency will require extensions of time beyond Standing Order No. 12 in which to file the opening briefs in these cases.²⁴

B. The Agency's Representation in the Instant Cases

Carlton Donnelly has two cases before this court – A-13597, an appeal of a 2011 case in which he was convicted of third-degree weapons misconduct and fourth-degree controlled substances misconduct, and A-13598, an appeal of a 2014 case in which he was convicted of third-degree assault, second- and fourth-degree controlled substances misconduct, and felony failure to stop. The trial court

²⁴ As the agency has indicated in its motions seeking additional extensions of time, it has a plan to address its backlog; that plan is currently undergoing review. But even under that plan, additional extensions of time would be needed.

1
2 sentenced Mr. Donnelly in both cases at a joint hearing in January 2020, and Mr.
3 Donnelly timely filed notices of appeal in both cases.

4
5 After receiving the maximum extension permitted under Standing Order
6 No. 12,²⁵ the agency asked this court for a 150-day extension, or until November 5,
7 2021, to file the opening brief in A-13597, which this court granted. And the agency
8 asked this court for a 128-day extension, or until November 5, 2021, to file the
9 opening brief in A-13598, explaining that the case was a companion case to A-13597
10 and that both cases needed to be assigned to the same lawyer so that the lawyer
11 could determine whether consolidation was appropriate.

12
13 Sharon Barr entered her appearance in both of Mr. Donnelly's cases
14 on June 28, 2021, and on July 15, 2021, this court denied the motion for an extension
15 in A-13598 in part. This court explained that the extension request did not comply
16 with the mandates of Standing Order No. 12 as "the press of ordinary business was
17 not intended to qualify as an 'extraordinary and unforeseeable circumstance.'" This
18 court ordered that the opening brief be filed by September 27, 2021.

19
20 At the time Ms. Barr entered her appearance in Mr. Donnelly's cases,
21 she had two cases awaiting the filing of an opening brief, *DeSimone v. State*, A-
22 13515, and *Sadowski v. State*, A-13445. *DeSimone* is an appeal of a first-degree
23 murder conviction; it has a 1,837-page transcript and 1,322 pages of record. Ms.
24 Barr filed her opening brief in that case on July 15, 2021.

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28 ²⁵ These extensions resulted in deadlines of June 8, 2021 (A-13597) and
June 30, 2021 (A-13598).

Ms. Barr entered her appearance in *Sadowski* on May 14, 2021, and at the time of her entry, the opening brief was due on August 31, 2021. *Sadowksi* is an appeal of a first-degree murder conviction; it has 1,467 pages of transcript and 1,016 pages of record. Because of her obligations in other cases and scheduled leave, Ms. Barr requested an additional 45-day extension, and the opening brief in *Sadowski* is due on October 15.

In July 2021, the agency had six child welfare cases needing assignment. Given the workloads of the section's lawyers, which included three child welfare cases assigned to section lawyers the month before, the agency assigned one of those cases, *G.T. v. State*, S-18115, to Ms. Barr.²⁶ Ms. Barr entered her appearance on July 26, 2021, and she filed the opening brief on September 3, 2021.

After she entered her appearance in Mr. Donnelly's cases, Ms. Barr also filed reply briefs in *L.C. v. State*, S-18002 (July 1, 2021), a child welfare appeal, and *Fawcett v. State*, A-13433 (August 10, 2021). In July, Ms. Barr provided a week's coverage for the agency's Ketchikan office, which had no staff lawyers at the time, and she was on leave for one week in August. Ms. Barr also provided regular advice to the agency's trial lawyers, consulted with and provided editing to the agency's appellate lawyers, and began her annual work hiring the agency's interns and externs.

²⁶ The appellant's brief notice in *G.T.* was issued on July 23, 2021, and it set a briefing deadline of August 12, 2021. *G.T.* has a 363-page transcript and 532 pages of record.

1
2 On September 27, 2021, Ms. Barr filed additional extension requests in
3 Mr. Donnelly's two cases. She detailed the work she had completed since she
4 entered her appearance in June, and she explained the need to review both of Mr.
5 Donnelly's cases for potential consolidation.²⁷ She asked this court to extend the
6 deadlines in both cases to December 30, 2021, but she noted that because of the
7 uncertainty regarding consolidation, she could require additional time.
8

9 This court rejected Ms. Barr's requests. Although acknowledging Ms.
10 Barr's diligence, this court maintained the existing deadline of November 5, 2021, in
11 A-13597, and it extended the deadline in A-13598 to November 5 to allow Ms. Barr
12 to review Mr. Donnelly's cases together.
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27 ²⁷ Ms. Barr pointed out that, together, Mr. Donnelly's two cases had over
28 1,800 pages of transcript. Additionally, the record in A-13597 is 1,130 pages, and
the record in A-13598 is 1,112 pages.

ARGUMENT

Because the Agency Cannot Comply with the Existing Deadline for Mr. Donnelly's Opening Brief and Fulfill Its Ethical and Constitutional Obligations to Mr. Donnelly and Its Other Clients, If This Court Does Not Grant Ms. Barr's Requested Extension, It Must Allow the Agency To Withdraw from Representation of Mr. Donnelly.

A. The agency's obligations to its clients are dictated by the Alaska Rules of Professional Conduct and the United States and Alaska constitutions.

1. The agency's clients are entitled to competent, diligent representation that complies with the federal and state constitutions.

Alaska's Rules of Professional Conduct govern a lawyer's relationship with her client. They direct the lawyer to provide competent representation,²⁸ which requires not only that a lawyer inquire into the particular factual and legal elements presented by the client's case and to adequately prepare but also that a lawyer maintain current knowledge of the law and its practice.²⁹ The rules direct a lawyer

²⁸ Alaska R. Prof. Conduct 1.1(a) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

²⁹ See Alaska R. Prof. Conduct 1.1(a) cmt., which provides, in part:

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problems, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation.

....

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

to act with reasonable diligence and promptness;³⁰ this requires that the lawyer's workload be managed to ensure competent representation.³¹ And the rules direct the lawyer to keep the client reasonably informed, so as to allow the client to make informed decisions about the representation;³² this includes a requirement that a lawyer promptly respond to reasonable requests for information from the client.³³

These ethical rules ground the representation of all lawyers, and they must be considered in light of the specific obligations of a criminal defense lawyer,

³⁰ Alaska R. Prof. Conduct 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

³¹ See Alaska R. Prof. Conduct 1.3 cmt. ("A lawyer's work-load must be controlled so that each matter can be handled competently. . . . A client's interests often can be adversely affected by the passage of time or the change of conditions[.]").

³² Alaska R. Prof. Conduct 1.4(a) ("A lawyer shall keep a client reasonably informed about the status of a matter undertaken on the client's behalf and promptly comply with reasonable requests for information. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

³³ See Alaska R. Prof. Conduct 1.4 cmt., which provides, in part:

Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

. . .

A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a) requires prompt compliance with the request. If a prompt response is not feasible, the lawyer or a member of the lawyer's staff should acknowledge receipt of the request and advise the client when a response may be expected.

generally,³⁴ and a public defender, specifically.³⁵ A criminal defendant's right to effective assistance of counsel is constitutionally guaranteed,³⁶ and effective assistance of counsel requires performance at a level displayed by one of ordinary

³⁴ See Alaska R. Prof. Conduct, scope ("The Rules presuppose a larger legal context shaping a lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers, and substantive procedural law in general."); CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION § 4-1.2(c) (Am. Bar. Ass'n 2017) [hereinafter ABA DEFENSE FUNCTION STANDARDS] ("Defense counsel should know and abide by the standards of professional conduct as expressed in applicable law and ethical codes and opinions in the applicable jurisdiction.").

³⁵ See Alaska R. Prof. Conduct 6.2 cmt. ("An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules."); *Polk County v. Dodson*, 454 U.S. 312, 321 (1981) ("Held to the same standards of competence and integrity as a private lawyer, see *Moore v. United States*, 432 F.2d 730 (3d Cir. 1970), a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client."); *State ex rel. Missouri Public Defender Comm'n v. Waters*, 370 S.W.3d 592, 608 (Mo. 2012) ("No exception exists to the ethics rules for lawyers who represent indigent persons."); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-441 (2006) ("The [Model] Rules [of Professional Conduct] provide no exception for lawyers who represent indigent persons charged with crimes.").

³⁶ UNITED STATES CONST. amend. VI; ALASKA CONST. art. I, § 11; *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel."); *Risher v. State*, 523 P.2d 421, 423 (Alaska 1974) ("The mere fact that counsel represents an accused does not assure this constitutionally-guaranteed assistance. The assistance must be 'effective' to be of any value.").

training and skill in the criminal law.³⁷ This includes the time and resources necessary to deploy this training and skill.³⁸

The question whether an individual defender provided effective assistance of counsel is necessarily a retrospective determination to be made in the context of the individual case.³⁹ Prospectively, a public defense organization has a duty to provide quality representation,⁴⁰ and the American Bar Association (ABA)

³⁷ See *Risher*, 523 P.2d at 424 (“Lawyers may display a wide spectrum of ability and still have their performance fall within the range of competence displayed by one of ordinary training and skill in the criminal law. It is only when the ability is below the nadir of that range that we would hold it to constitute a deprivation of effective assistance of counsel.”); see also *Kuren v. Luzerne County*, 146 A.3d 715, 735-36 (Pa. 2016) (“The Court’s eloquent descriptions in *Johnson* and *Gideon* of the essential nature of the right to a lawyer would ring hollow, and would amount to empty rhetoric, if appointment of counsel for indigent defendants is but a mere formality. It is the defense itself, not the lawyers as such, that animates *Gideon*’s mandate. If the latter cannot provide the former, the promise of the Sixth Amendment is broken.”).

³⁸ *In re Edward S.*, 92 Cal.Rptr.3d 725, 740 (Cal. App. 2009) (“Under [the constitutional right to effective assistance of counsel], the defendant can reasonably expect that in the course of representation his counsel will undertake only those actions a reasonably competent attorney would undertake. But he can also reasonably expect that before counsel undertakes to act at all he will make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation.”); *State v. Peart*, 621 So.2d 780, 789 (La. 1993) (“We take reasonably effective assistance of counsel to mean that the lawyer not only possesses adequate skill and knowledge, but also that he has the time and resources to apply his skill and knowledge to the tasks of defending each of his individual clients.”).

³⁹ See, e.g., *Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir. 1988).

⁴⁰ See PROVIDING DEFENSE SERVICES § 5-1.1 (Am. Bar Ass’n 1992) (“The objective in providing counsel should be to assure that quality legal representation is afforded to all persons eligible for counsel pursuant to this chapter.”); see also *Luckey*, 860 F.2d at 1017 (“The sixth amendment protects rights that do not affect the outcome of a trial. Thus, deficiencies that do not meet the ‘ineffectiveness’ standard may nonetheless violate a defendant’s rights under the sixth amendment.

has developed standards governing the provision of quality representation of criminal defendants.⁴¹ The ABA standards include guidelines addressing appellate representation,⁴² which direct appellate counsel to “consider all issues that might affect the validity of the judgment of conviction and sentence, including any that might require initial presentation in a trial court” and to “consider raising on appeal even issues not objected to below or waived or forfeited, if in the best interests of the client.”⁴³ An appellate defender is to “examine the record and the relevant law” and only then “provide counsel’s best professional evaluation of the issues that might be presented on appeal.”⁴⁴ This evaluation includes advice “about the probable and possible outcomes and consequences of a challenge to the conviction or sentence.”⁴⁵

In the post-trial context, such errors may be deemed harmless because they did not affect the outcome of a trial. Whether an accused has been prejudiced by the denial of a right is an issue that relates to relief – whether the defendant is entitled to have his or her conviction overturned – rather than to the question of whether such a right exists and can be protected prospectively.”).

⁴¹ See ABA DEFENSE FUNCTION STANDARDS, *supra* note 34; *see also id.* at § 4-1.1 (“The standards are intended to be used as a guide for the professional conduct and performance of defense counsel.”).

⁴² *Id.* at §§ 4-9.2 – 4-9.3. The National Legal Aid and Defender Association (NLADA) has also developed criminal defense standards, but they only address trial practice. See PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (Nat’l Legal Aid & Defender Ass’n 2006) [hereinafter NLADA PERFORMANCE GUIDELINES].

⁴³ ABA DEFENSE FUNCTION STANDARDS, *supra* note 34, at § 4-9.2(b).

⁴⁴ *Id.* at § 4-9.2(c).

⁴⁵ *Id.*

These standards also explain the client-driven nature of an appeal, directing a lawyer to present an appeal, if able to do so without misleading the court, even when the decision to proceed with a non-frivolous appeal is made against the advice of counsel.⁴⁶ A lawyer “should also discuss with the client the arguments to be presented in appellate briefing and at argument, and should diligently attempt to accommodate the client’s wishes,” working with the client to reach an agreeable resolution about colorable claims the client wants to raise.⁴⁷

2. The agency may not represent a client if that representation will create a conflict of interest or deprive any client of effective assistance of counsel.

A lawyer may not represent a client if that representation involves a concurrent conflict of interest.⁴⁸ “A concurrent conflict of interest exists if there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client[.]”⁴⁹ A disqualifying conflict exists even when there is no direct adversity; there need only be “a significant risk that a lawyer’s ability to consider, recommend or carry out an appropriate course of action will be materially limited as a result of the lawyer’s other responsibilities or interests.”⁵⁰

⁴⁶ *Id.* at § 4-9.2(f).

⁴⁷ *Id.* at § 4-9.2(g).

⁴⁸ Alaska R. Prof. Conduct 1.7(a)(2).

⁴⁹ *Id.*

⁵⁰ Alaska R. Prof. Conduct 1.7(a)(2), cmt.

A lawyer's ability to represent a client depends on her ability to provide all her clients with the level of representation that meets ethical and constitutional norms.⁵¹ When representation of multiple clients presents a significant risk of materially limiting the representation of one client, a concurrent conflict of interest exists. As the professional conduct rules explain:

The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.^[52]

A lawyer's workload can create a concurrent conflict of interest:⁵³ "[A] conflict of interest is invariably created when a public defender is compelled by his

⁵¹ *Id.*; see also *State ex rel. Missouri Public Defender Comm'n v. Waters*, 370 S.W.3d 592, 607 (Mo. 2012) (stating that ethical rules "apply not just in relation to new clients but also to existing clients, such that an attorney's acceptance of a new case violates [Missouri professional conflict rule prohibiting representation that involves concurrent conflict of interest] if it compromises her ability to continue to provide effective assistance to her other clients").

⁵² Alaska R. Prof. Conduct 1.7(a)(2) cmt.

⁵³ *State ex rel. Missouri Public Defender Comm'n v. Waters*, 370 S.W.3d 592, 607 (Mo. 2012) (stating that public defender's ethical duties apply "not just in relation to new clients, but also to existing clients, so that an attorney's acceptance of a new case violates [concurrent conflict of interest rule] if it compromises her ability to continue to provide effective assistance to her other clients" and quoting *In re Edward S.*, 92 Cal.Rptr.3d 725, 740 (Cal. App. 2009)); *Public Defender, Eleventh Judicial Circuit of Florida v. State*, 115 So.3d 261, 279 (Fla. 2013) (stating public defender has good cause to seek withdrawal when excessive caseload shows substantial risk that representation of one or more clients will be materially limited by lawyer's responsibilities to another client); Bureau of Justice Assistance, U.S. Dep't of Justice, KEEPING DEFENDER WORKLOADS MANAGEABLE, at 4 (Jan. 2011) (stating that "conflict of interest . . . arises when excessive caseloads force [public defenders] to choose which of their clients receive the defense to which they are entitled"); Stephen F. Hanlon, *Case Refusal: A Duty for a Public Defender and a Remedy for All of a Public Defender's Clients*, 51 IND. L. REV. 59, 63 (2018) (stating that

or her caseload to choose between the rights of the various indigent defendants he or she is representing.”⁵⁴ And when a public defender’s excessive workload prevents her from subjecting the prosecution’s case to meaningful adversarial testing,⁵⁵ it deprives her clients of effective assistance of counsel.⁵⁶

B. The agency cannot comply with this court’s current filing deadline and provide competent, constitutional representation to Mr. Donnelly without creating a concurrent conflict of interest.

This court issued its order denying Ms. Barr’s extension request on October 1, setting the deadline for filing the opening briefs in both of Mr. Donnelly’s cases at November 5. As this court has recognized, notwithstanding the prior

concurrent conflict of interest under Rule 1.7 “is exactly what happens when public defenders represent so many clients that they cannot competently represent each client”).

⁵⁴ *Edward S.*, 92 Cal.Rptr.3d at 746-47; *cf.* ABA Comm. on Ethics & Prof’l Responsibility, Formal Opinion 96-399, at 2 (1996) (detailing ethical duties of civil legal aid lawyers facing funding restrictions and noting that “[a] legal services lawyer may not accept new clients except in cases of extreme need if staff reductions have caused an unacceptable increase in the lawyer’s work load”); *id.* at 14 (“A lawyer’s obligations to provide competent and diligent representation under Model Rules 1.1 and 1.3 imposes a duty to monitor workload, a duty that requires declining new clients if taking them on would create a ‘concomitant greater overload of work.’ See ABA Formal Opinion 347 (1981). Only in ‘extreme cases’ should the legal services lawyer, confronted with increased responsibilities as a result of funding and staff reductions, take on new matters. *Id.*”).

⁵⁵ *See United States v. Cronin*, 466 U.S. 648, 656 (1984) (“The right to effective assistance of counsel is thus the right of the accused to require the prosecution’s case to survive the crucible of meaningful adversarial testing.”).

⁵⁶ *See Edward S.*, 92 Cal.Rptr. at 748 (holding public defender provided ineffective assistance of counsel when caseload caused representation that fell below objective standard of reasonableness); *see also Waters*, 370 S.W.3d at 608 (stating that ethical rules run parallel to trial court’s duty to protect defendants’ right to counsel).

1
2 extensions of time granted in these cases, Ms. Barr had not begun working on Mr.
3 Donnelly's cases. For that reason, for Ms. Barr to file the opening briefs in these
4 cases, she would have to complete all the work necessary to provide competent,
5 constitutional representation within the 24 working days provided by this court's
6 order.
7

8 Mr. Donnelly's cases consist of over 1,800 pages of transcript and over
9 2,000 pages of record. Review of these materials would take at least 8 days, leaving
10 16 days for "considering all issues that might affect the validity of" Mr. Donnelly's
11 convictions and sentence, examining the relevant law, consulting with Mr. Donnelly
12 about the issues that might be presented on appeal, and determining whether to
13 consolidate Mr. Donnelly's cases.⁵⁷ Once Ms. Barr makes the decision on
14 consolidation, she would need to draft one or two briefs, have the brief(s) edited,
15 revise the brief(s), submit the brief(s) for formatting, and finalize the brief(s) for filing.
16 Even for a lawyer with Ms. Barr's experience, this is an ambitious, if not nearly
17 impossible, amount of work to accomplish by the current filing deadline.
18

19
20 And even if Ms. Barr could complete this work within the 24 working
21 days provided by this court's order, she could not do so without creating a concurrent
22 conflict of interest with her other clients. That is, attempting to comply with the
23 deadlines imposed by this court would require Ms. Barr to begin working exclusively
24 on Mr. Donnelly's cases on October 4. But as explained above, Ms. Barr has an
25 October 15 deadline in *Sadowski*. If Ms. Barr worked exclusively on Mr. Donnelly's
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See *supra* notes 42 – 47 and accompanying text.

cases, her ability to provide Mr. Sadowski the competent and constitutional representation he is entitled would be materially limited.⁵⁸

That is, Ms. Barr's workload prevents her from working exclusively on Mr. Donnelly's cases. A lawyer's total workload is comprised of both the work required to comply with her ethical and constitutional obligations in every case on her caseload, plus other tasks for which the lawyer is responsible.⁵⁹ These other tasks are critical to the provision of ethical and constitutional representation. As one commentator explained:

A defender's work involves more than her cases. She must consult with others about her cases, engage in review processes to assure quality in her cases, and handle other work, for example, brainstorming, case or peer review, mock presentations, post-case critiques, and performance evaluations. An ethical defender maintains and advances her knowledge by reading newly decided cases and newly enacted laws and rules, and by attending training sessions. She must support others in her office by doing case consultation for her colleagues. Defenders must perform administrative and office duties. She must supervise support staff to ensure that their work is at the requisite standard.^[60]

⁵⁸ Alaska R. Prof. Conduct. 1.7(a)(2).

⁵⁹ NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 26 (2011) ("Workload is the sum of all work performed by the individual at any given time, which includes the number of cases to which the attorney is assigned, but also includes other tasks for which that attorney is responsible.") (internal quotation marks omitted).

⁶⁰ *Id.* at 26 n.1 (2011) (quoting Edward C. Monahan & James C. Clark, *Coping with Excessive Workload*, ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER, 319 (1995)).

Because of Ms. Barr's obligations in her other cases and her other responsibilities, she cannot exclusively work on Mr. Donnelly's cases in an attempt to meet this court's deadlines.⁶¹

Similarly, the section's other lawyers have obligations to clients in other cases where deadlines have already been extended past Standing Order No. 12, as well as other responsibilities, such that no other staff lawyer has the capacity to

⁶¹ In its order denying the extension request in A-13598, this court noted its concern "that appellate attorneys with cases beyond the Standing Order No. 12 limit are being asked to perform duties outside of the appellate unit with no apparent accounting for the effect of these duties on the briefing deadlines set by the Court," pointing to Ms. Barr's work in the agency's Ketchikan office for a week earlier this year. This court stated that "the resource shortages at the Agency do not constitute 'extraordinary and unforeseeable circumstances' justifying an extension of time beyond the Standing Order No. 12 limit."

The agency's appellate lawyers are no longer routinely providing coverage for the agency's trial lawyers. Instead, Ms. Barr's work in Ketchikan addressed an extraordinary resource shortage. Resignations, in and of themselves, are neither extraordinary nor unforeseeable, but the agency's difficulty in replacing the experienced lawyers who have resigned over the past 18 months, during the global pandemic, has been extraordinary. When the agency has been successful in filling vacant positions, it has done so with recent graduates and lawyers without any criminal legal experience.

As a result, when the timing of resignations and start dates of lawyers in the Ketchikan office combined to create a five-week period in which no lawyers would be present in Ketchikan, the agency had few experienced lawyers available to represent indigent Alaskans in Ketchikan. Ms. Barr was the only lawyer from the agency's appellate section to go to Ketchikan, even though the appellate section has the greatest proportion of experienced lawyers in the agency and therefore was in the best position to send multiple lawyers. Moreover, as evidenced by Ms. Barr's motion, it was the assignment of an expedited child welfare appeal, not her week in Ketchikan, that was the primary basis of the need for additional time in Mr. Donnelly's cases.

provide Mr. Donnelly competent, effective representation in his cases.⁶² And while the agency continues to use contractors to address its backlog, it does not have a contractor available that can meet the deadlines imposed by this court.

C. This court should grant Ms. Barr’s request for an extension of time until December 30 or allow the agency to withdraw and appoint conflict-free counsel to represent Mr. Donnelly.

The agency cannot provide Mr. Donnelly with competent representation if it complies with this court’s order requiring the agency to file the opening briefs in his case by November 5.⁶³ Moreover, an attempt to comply with this court’s order presents a significant risk that agency’s ability to provide its other clients with competent, constitutional representation will be materially limited by its responsibilities to Mr. Donnelly.⁶⁴ When a lawyer cannot provide competent representation or when a concurrent conflict of interest exists, the lawyer must withdraw from the representation.⁶⁵

⁶² Moreover, the voluminous record and procedural complexity of Mr. Donnelly’s cases make them particularly ill-suited for assignment to a lawyer with minimal appellate experience.

⁶³ Alaska R. Prof. Conduct 1.1(a).

⁶⁴ Alaska R. Prof. Conduct 1.7(a)(2).

⁶⁵ Alaska R. Prof. Conduct 1.7, cmt; see *also* NLADA PERFORMANCE GUIDELINES, *supra* note 42, § 1.3(a) (“Before agreeing to act as counsel or accepting appointment by a court, counsel has an obligation to make sure that counsel has available sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a particular matter. If it later appears that counsel is unable to offer quality representation in the case, counsel should move to withdraw.”).

A lawyer may continue to represent a client notwithstanding a concurrent conflict of interest when certain conditions are met. See Alaska R. Prof.

Accordingly, this court should extend the deadline for filing Mr. Donnelly's briefs until December 30, the time Ms. Barr believed to be the minimum necessary to represent Mr. Donnelly in accordance with her ethical and constitutional obligations.⁶⁶ If it does not, this court should permit the agency to withdraw from representation of Mr. Donnelly and appoint him conflict-free counsel to ensure he receives the competent, effective representation to which he is entitled.⁶⁷ This would also permit Ms. Barr and the agency's other lawyers to provide the agency's other clients the competent, constitutional representation to which they are entitled.

CONCLUSION

If this court does not grant Ms. Barr's request to extend the deadlines for filing Mr. Donnelly's opening briefs to December 30, 2021, it should permit the Alaska Public Defender Agency to withdraw from representing Mr. Donnelly and should appoint Mr. Donnelly conflict-free counsel.

Conduct 1.7(b). But to do so, the lawyer must reasonably believe she can provide competent and diligent representation to each client, see Alaska R. Prof. Conduct 1.7(b)(1), and neither Ms. Barr nor any other agency lawyer can do so.

⁶⁶ Extending the current deadline would alleviate the uncertainty this court's order likely caused Mr. Donnelly (and other individuals the agency represents who learned of the order). This court's order denying Ms. Barr the time she explained she needed to provide competent and constitutional representation in these cases suggests to Mr. Donnelly that any brief filed by this court's deadlines will not comply with prevailing standards of appellate representation and that he will not receive the same level of representation those before him on the agency's waiting list received.

⁶⁷ Appointing conflict-free counsel who can provide competent, effective representation in this case would likewise alleviate the uncertainty and consternation this court's order likely caused Mr. Donnelly.

Alaska Public Defender Agency
Renee McFarland • renee.mcfarland@alaska.gov
900 West 5th Avenue, Suite 101 • Anchorage, AK 99501
Phone: (907) 334-2670 • Fax: (907) 334-4440
Service: doa.pda.appeals.pleading@alaska.gov

ALASKA PUBLIC DEFENDER AGENCY

DATE October 15, 2021

/s/ Renee McFarland

RENEE McFARLAND (0202003)

DEPUTY PUBLIC DEFENDER

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/s/ Renee McFarland
RENEE McFARLAND (0202003)
DEPUTY PUBLIC DEFENDER

Subscribed and sworn to before me on: _____

Notary Public in Alaska
Commission expires with office

I certify that on October 15, 2021 a copy of this document and its attachments was emailed to: Diane Wendlandt (OCA)

By: SB

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

CARLTON WILLIAM DONNELLY,

Appellant,

vs.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-13597

Trial Court No. 3AN-11-13926CR

**OPPOSITION TO MOTION TO PERMIT WITHDRAWAL AND FOR
APPOINTMENT OF CONFLICT-FREE COUNSEL**

VRA CERTIFICATION. I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim or witness to any crime unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

The Public Defender Agency, which represents Carlton Donnelly in this and a related appeal, has filed a motion asking to withdraw as Donnelly's counsel after this court denied its third request to extend the deadline for filing its opening brief. The agency's motion presents the court with a false choice by asking it to either grant the agency's extension request or allow the agency to shift its problems to someone else by withdrawing as counsel. The state opposes the motion because it attempts to solve the agency's internal problems at the expense of the defendants whose cases have been pending the longest and because the relief requested by the agency does nothing to address the underlying problems that gave rise to the agency's present inability to meet

this court's deadlines.

This appeal was filed by the agency nearly two years ago, in January 2020. Donnelly's brief was originally due on May 14, 2020. And yet, the case was not assigned to an attorney for briefing until June 2021. The deadline for filing the opening brief has been extended twice—by 390 days and then by another 150 days—for a total of 540 days, well in excess of the 390 days permitted by this court's Standing Order No. 12. The brief is now due on November 5, 2021. However, agency attorney Sharon Barr filed a third request for extension on September 29, 2021, asking for an additional 55 days, until December 30, 2021. But she candidly admitted that she could not give any assurance that she would be able to file the brief within the requested deadline, thus leaving open the very real possibility that she would request yet another extension as the December 30 deadline approached.

As this court pointed out in its order denying the third extension request, it is clear that little or no work has been done on this case despite both the prior extensions and the court's "clear expectation" when it granted the second extension "that the opening brief would be actively worked on during the 150-day period." *See Order*, dated October 1, 2021, at 2. This court noted, as it has several times before, that "the ordinary press of business and resource shortages at the Public Defender Agency are not 'extraordinary and unforeseeable circumstances' justifying an extension of time beyond the limit

of Standing Order No. 12.” *Id.* at 2-3.

In response, the Public Defender Agency presents this court with an ultimatum: the court must either grant without question the agency’s further requests for extension or else the agency will withdraw, leaving the court system and other agencies to deal with the appellant’s case. In its motion, the agency claims that, because of its overwhelming caseload and underfunding, it cannot complete the brief in this appeal by the current deadline (November 5) and still provide effective assistance of counsel to Donnelly and its other clients. The agency argues that its inability to handle its caseload has created concurrent conflicts of interest among its clients, conflicts that cannot be resolved until either its caseload has been reduced or it receives additional funding and resources from the legislature.

The state’s primary objection to the current motion is that it seeks to solve the agency’s resource issues by withdrawing as counsel from what is likely one of the agency’s oldest cases—a case in which 540 days of extensions have already been granted. This is a case that can least afford the added delay that would be caused by withdrawal and appointment of new counsel. If the agency is unable to find alternative solutions to its internal issues, it should reconsider which cases it seeks to withdraw from. Surely, there must be more recent cases that could be targeted for withdrawal, thus freeing up a staff attorney or contract attorney to complete this case in the time remaining.

Moreover, the state is troubled by the agency's proposed solution: instead of solving its internal management and budget issues, it seeks to shift those issues to OPA, who would be appointed as conflict counsel if the agency withdraws, and ultimately to the court system if OPA becomes overwhelmed by the agency's overflow and counsel must be appointed under Administrative Rule 12(e). Given the downstream impact of the agency's request, the agency cannot complain if this court elects to more closely review the management of the agency's appellate unit. Despite the recitation of case numbers and productivity statistics, the agency's motion provides little information on the true problem. It is worth noting that the agency is not the only government office handling criminal appeals; OPA and the Office of Criminal Appeals also handle a high volume of appeals with limited staff. And yet, those agencies have found ways to create efficiencies and meet this court's deadlines.

The state normally would not comment on the internal practices of the agency, but the extreme remedy requested by the agency has put those practices at issue. Surely, there are other ways to increase productivity without raising the specter of ineffective assistance. The most obvious example was suggested by this and other courts: being more selective as to the issues briefed. *See Jones v. Barnes*, 463 U.S. 745, 751-52 (1983) ("Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue

if possible, or at most on a few key issues.”); *Tyler v. State*, 47 P.3d 1095, 1107 (Alaska App. 2001) (“We recognize that [appellate] advocacy invariably includes a process of separating wheat from chaff, of deciding which arguments and legal authorities are important to a case.”); *Tucker v. State*, 892 P.2d 832, 836 & n.7 (Alaska App. 1995) (decision to winnow out weaker arguments on appeal is part of effective appellate advocacy; appellate counsel is not required to raise every colorable claim).

Likewise, the agency’s decision to assign only one brief at a time to each appellate attorney is flawed. While the agency may wish to protect its attorneys from the pressure of heavy caseloads, that pressure can often be a positive force, providing motivation and a realistic sense of the need for triage and decision-making of the type discussed in the cases cited above. Allowing each attorney to work on one brief, without several others waiting in line on the attorney’s desk, creates a false sense of ease that can only increase the agency’s problem with deadlines.

Moreover, there appear to be a variety of other management choices that have exacerbated the agency’s problems. From prior affidavits in support of extensions beyond the time allowed by Standing Order No. 12, it appears that the agency has repeatedly chosen to allocate appellate resources to trial work, including having appellate attorneys cover trials, act as second-chair counsel at trials, and handle trial-related pleadings and petitions for review,

which could, and probably should, be handled by trial attorneys within the agency. In fact, one could just as easily argue that the agency should seek to withdraw as counsel in cases that are in pretrial status rather than diverting appellate attorneys to trial matters and then seeking to withdraw from already belated appeals. The state also understands that the appellate attorneys were approved to attend the bar convention and they often attend oral arguments of their peers in mass. And, appellate attorneys are apparently sent around the state to cover short-staffed trial offices. The agency also appears to give priority to CINA and other civil appeals over criminal appeals and has chosen not to have separate civil and criminal appellate units.

These are all management choices by the agency. Ordinarily, the state would not question these choices, nor would it suggest that this court should question the agency's decisions in this regard. But the agency's motion has put those choices squarely at issue. By its current motion, the agency seeks to push the consequences of those choices onto someone else—either OPA, the court system, its clients, the victims, or the public at large. In its previous orders, this court has strongly encouraged the agency to rethink its allocation of resources or to change its culture, which appears to give little priority to this court's deadlines. To the extent that the agency has now made its problem the court's problem, the court is justified in reviewing the agency's management decisions more closely.

The state does not dispute that criminal defendants deserve effective assistance of appellate counsel. The state also does not dispute that in some states, extreme funding shortages for public defender services may create a risk of ineffective assistance sufficient to justify the drastic remedies noted in the footnotes to the agency's motion. But the state does not believe that the agency has been entirely candid in describing its efforts to resolve its alleged staffing issues, and the state does not accept the agency's vague assurance that it has a "plan to address its backlog," which is "currently undergoing review." *See Motion to Permit Withdrawal*, at 9 n.24. The agency has had seven years to devise an effective plan, and when it became apparent that its initial plan was not working, something else should have been tried.

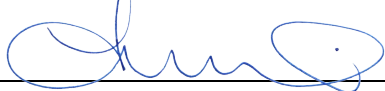
The state does not fault individual attorneys or the agency's current deputy director of appeals. But from its recent motion, it appears that the agency has been operating on hope rather than good management techniques to address its backlog problem. Regardless of the cause of the backlog, however, the solution is not to grant further extensions or to allow the agency to withdraw from the oldest appeals. If the agency is truly unable to resolve its backlog through other means, then it should seek to withdraw from cases for which further delays will not burden the appellate system. If withdrawal is the only option, the agency should consider withdrawing from cases recently assigned to it, such as cases that are still in pretrial status, and then

reallocating trial attorneys (since most criminal trials have been suspended for almost two years now) to assist in clearing the appellate backlog.

For the foregoing reasons, this court should deny the Public Defender Agency's motion to withdraw from this appeal.

DATED October 19, 2021.

TREG R. TAYLOR
ATTORNEY GENERAL

By: 

Tamara E. DeLucia (9906015)
Solicitor General, Criminal Appeals

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

CARLTON WILLIAM DONNELLY,

Appellant,

vs.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-13597

Trial Court No. 3AN-11-13926CR

CERTIFICATE OF SERVICE AND TYPEFACE

I, Sylva M. Ferry, state that I am employed by the Alaska Department of Law, Office of Criminal Appeals, and that on October 19, 2021, I emailed a copy of the State's OPPOSITION TO MOTION TO PERMIT WITHDRAWAL AND FOR APPOINTMENT OF CONFLICT-FREE COUNSEL and this CERTIFICATE OF SERVICE AND TYPEFACE in the above-titled case to:

Sharon Barr
Public Defender Agency
900 W 5th Ave, Ste 200
Anchorage, AK 99501
sharon.barr@alaska.gov

I further certify, pursuant to App. R. 513.5, that the font used in the aforementioned documents is Century Schoolbook 13 point.


Sylva M. Ferry

In the Court of Appeals of the State of Alaska

Carlton W. Donnelly,
Appellant,

v.

State of Alaska,
Appellee.

Court of Appeals Nos. **A-13597 & A-13598**

Order

Date of Order: **10/22/2021**

Trial Court Case Nos. **3AN-11-13926CR, 3AN-14-08520CR**

Before: Wollenberg, Harbison, and Terrell, Judges.

The Public Defender Agency has requested permission to withdraw from these appeals and has asked this Court to appoint new counsel to the Appellant, Carlton W. Donnelly. The Agency states that, given this Court's denial of its most recent motions for an extension to file the opening brief in these appeals, the Agency cannot comply with the filing deadline imposed by this Court and thus cannot fulfill its ethical responsibilities to Donnelly and to the Agency's other clients. (In the alternative, the Agency asks this Court to reconsider the denial of its extension requests.)

The State opposes the Agency's motion. Among other things, the State notes the age of these appeals, pointing out that the Agency has already received extensions totaling over 500 days in each case.

If the Agency is allowed to withdraw, the Office of Public Advocacy would become responsible for representing Donnelly in these appeals. The Court therefore concludes that it would be appropriate to hear the Office of Public Advocacy's position on the Agency's motion.

Accordingly, IT IS ORDERED:

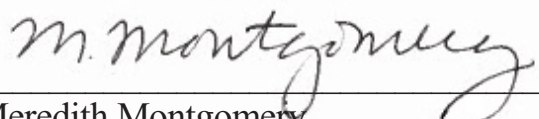
1. On or before October 29, 2021, the Office of Public Advocacy shall file a response to the Agency's motion to withdraw.

2. The response need not conform with Appellate Rule 212, although the response must include appropriate citations to legal authority.

3. The Clerk of the Appellate Court is directed to provide to the Office of Public Advocacy a copy of this Court's two orders on Donnelly's extension requests (dated October 1, 2021), the Agency's motion to withdraw, and the State's oppositions to the Agency's motion to withdraw. (The Agency filed a consolidated motion in both appeals, and the State filed separate pleadings in opposition in each appeal.)

Entered at the direction of the Court.

Clerk of the Appellate Courts


Meredith Montgomery

cc: Brooke Berens, Office of Public Advocacy

Distribution:

Email:
Barr, Sharon, Public Defender
Wendlandt, Diane L.

1 IN THE COURT OF APPEALS OF THE STATE OF ALASKA

2 CARLTON W. DONNELLY,)

3)
4 Appellant,)

5 v.)

Court of Appeals No. A-13597 & A-13598

6 STATE OF ALASKA,)

7)
8 Appellee.)
9 _____)

10 Trial Court Case Nos. 3AN-11-13926CR, 3AN-14-08520CR

11 **OFFICE OF PUBLIC ADVOCACY'S RESPONSE TO COURT'S ORDER**

12 The Office of Public Advocacy (OPA), by and through James Stinson, the Public
13 Advocate, responds to this Court's order by taking the following positions: (1) If this Court
14 allows the Public Defender Agency (PDA) to withdraw it must appoint counsel under
15 Administrative Rule 12(e), because appointment to OPA would fall well outside of this
16 agency's enabling statute and would cause additional delay; (2) any sanctions should be
17 imposed on the PDA as an agency, and not on individual attorneys; (3) the backlog of cases
18 and staffing shortages caused by the COVID-19 pandemic are very real challenges for
19 everyone involved in the criminal justice system and are extraordinary circumstances that
20 should be considered by this Court.

21 **A. Appointing OPA to this case would fall well outside of the agency's enabling**
22 **statute and is not a practical resolution to the problem. If withdrawal is**
23 **granted, appointment of counsel must be made through Administrative Rule**
24 **12(e).**

25 OPA respectfully disagrees with the Court's assertion that the agency will become
26 responsible for representing Donnelly if the PDA withdraws. OPA can accept
27 appointments only where the basis for the appointment is "clearly authorized."
28

Office of Public Advocacy's Response to Court's Order

Donnelly v. SOA, A-13597 & A-13598

Page 1 of 8

Attachment F

Administrative Rule 12(d).¹ The plain language of OPA’s enabling statute makes it clear that the PDA must have a conflict of interest that prevents it from representing a client before the case can be assigned to OPA. Under AS 44.21.410(a)(5) OPA is to “provide legal representation... in cases involving indigent persons who are entitled to representation under AS 18.85.100 and who **cannot be represented by the public defender agency because of a conflict of interest.**” (emphasis added.)

That has always meant an actual conflict arising under the Professional Conduct Rules – most often Rule 1.7. That rule discusses concurrent representation of clients who are adverse to one another.² The PDA’s failure to comply with a court order within a dictated timeline is not a basis for appointing OPA because it is not an actual conflict between the PDA and Donnelly based on the facts of the case.

The PDA cites several Professional Conduct Rules to justify withdrawal.³ But this is not a unique situation that is specifically tied to Donnelly or the facts of his case. It is an alleged “conflict” due to the volume and pace of work the PDA must do. It is also a “conflict” that will be repeated regardless of who the is client is. Finally, the PDA acknowledges it is a “conflict” only because of the Court’s timeline. The PDA may not have the resources to provide effective assistance of counsel and comply with this Court’s deadlines, but the PDA’s lack of resources and resulting inability to meet this Court’s deadlines is not a conflict of interest as contemplated by OPA’s enabling statute.

¹ Administrative Rule 12(d) reads: “Withdrawal from Unauthorized Appointment. The public defender agency and the office of public advocacy shall accept appointments only in those cases for which the basis for the appointment is clearly authorized. If the agency or office determines that the basis for an appointment is not clearly authorized, the agency or office shall file with the court a motion to withdraw from the appointment.” (emphasis added).

² Alaska R. Prof. Conduct 1.7(a)(2) “A concurrent conflict of interest exists if there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client”

³ “Motion to Permit Withdrawal and for Appointment of Conflict-Free Counsel” at 13-24 (hereinafter “PDA Motion”).

1 The present situation does not involve an attorney's loyalty being divided due to an
2 actual conflict of interest between clients. The PDA argues that a temporary short-term
3 conflict has arisen due to the Court's timeline and is requesting an extension until
4 December 30, 2021.⁴ This means the conflict would dissipate between now and that date.
5 When a conflict dissipates, OPA is no longer statutorily required to represent a client
6 because the client can now be represented by the PDA. *See* AS 44.21.410(a)(5) (the client
7 must not be able to be represented by the PDA due to a conflict of interest).

8 In addition to the fact that this appointment would be outside the scope of OPA's
9 enabling statute, the court must consider its practical implications. If undue delay is the
10 basis for reassigning a case to OPA, reassignment will not resolve this issue and would
11 actually exacerbate it. A new OPA appellate attorney, whether in-house or a contractor,
12 will undoubtedly delay the case even further given their own current caseloads. Unlike the
13 PDA, OPA has but a single in-house attorney who focuses primarily on appellate cases,
14 though she also handles a range of other cases in addition to significant administrative
15 responsibilities.

16 Thus, OPA is heavily reliant on a limited pool of independent contractors. The
17 agency currently has approximately ten contractors who handle criminal appeals; some
18 only accept a few cases each year, and virtually all of them also handle OPA post-
19 conviction cases, CINA appeals, criminal or CINA trial cases; contract cases from the
20 PDA; or private cases. There is no reason to think that OPA could assign Donnelly's appeal
21 to an attorney who could file the opening brief before December 30, and every reason to
22 think OPA's requested deadline would be far later than the PDA's. OPA has neither the
23 capacity nor legal authority to accept appointments beyond what was intended in its
24 enabling statute.

25 The Professional Conduct Rules discuss a spectrum of acceptable conduct.
26 Assigning the cases to OPA at this juncture would surely be a further departure from what
27

28

⁴ PDA Motion at 24.

1 is acceptable because it would greatly increase the delay rather than resolve it. Moreover,
2 the “conflict” would dissipate long before an OPA attorney made progress with the case
3 and it could then be sent back to the PDA.

4 Further, it is not logical for the consequence of not complying with the Court’s order
5 to be that the PDA can simply wash its hands of the problem. Rather, the Court should
6 either accept the PDA’s explanation and allow the PDA more time or impose a
7 consequence on the PDA as an agency, or both. If the Court were to grant the PDA’s
8 Motion to Withdraw, it would create a precedent for the PDA (or any attorney) who
9 couldn’t meet the Court’s deadline to assert these “conflicts” and withdraw.⁵ This does not
10 resolve the underlying issue nor is it what the Legislature envisioned when it adopted
11 OPA’s enabling statute. OPA is intended, in relevant part, to accept indigent clients who
12 are adverse to a PDA client – not to act as an overflow agency when PDA caseloads grow
13 too large.

14 If the Court grants the PD’s motion to withdraw, the case cannot be reassigned to
15 OPA. Instead, appointment of counsel must be made under Admin. R. 12(e).

16 Administrative Rule 12(e) provides:

17 If the court determines that counsel, or a guardian ad litem, or other
18 representative should be appointed for an indigent person, and further
19 determines that the appointment is not authorized by AS 18.85.100(a) or AS
20 44.21.410, but in the opinion of the court is required by law or rule, the court
21 shall appoint an attorney who is a member of the Alaska Bar Association to
22 provide the required services. Other persons may be appointed to provide
23 required services to the extent permissible by law.

23 ⁵ The PDA cites Professional Conduct Rules 1.1, 1.3, 1.4, and 1.7. The assertion is the
24 same, that the Court will force the PDA to violate these rules if it maintains its timeline.
25 However, this Court should look to its holding in *Daniels v. State* 17 P.3d 75 (Alaska
26 App. 2001) which states that a trial court only has the authority to disqualify a publicly
27 appointed attorney if it is necessary to ensure the integrity of the judicial process. *Id.* at
28 82. While timeliness of appellate briefing is certainly a factor to consider, it cannot be
the sole factor in considering these motions. This is especially true when the remedy
being contemplated, assigning a new attorney, will worsen the timeliness issues, not
resolve them.

1 If the Court believes the PDA cannot provide Donnelly with adequate representation
2 and grants the motion to withdraw, this Court should appoint counsel under Administrative
3 Rule 12(e). This rule gives the Court broad discretion to appoint counsel in unique
4 circumstances and is the appropriate remedy when, as here, an appointment would be
5 outside of OPA's enabling statute. Because the Court can appoint any member of the
6 Alaska Bar Association, it is possible that the case could be transferred to an attorney who
7 could file a brief before the PDA's requested deadline.

8 **B. Any sanctions should be imposed on PDA as an agency, and not on individual**
9 **attorneys.**

10 This Court may be considering imposing sanctions on the PDA for its failure to
11 comply with the extension limits imposed by Standing Order 12.⁶ If the Court is trying to
12 flag the appellate backlog as an issue for the legislature, then sanctions could potentially
13 be appropriate. That would allow the Public Defender to bring the issue to the attention of
14 lawmakers. However, there is no guarantee that such a strategy for funding public defense
15 would be successful. The State of Alaska faces numerous budgetary challenges and there
16 are many opinions on how to handle those challenges.

17 It is important that this Court impose any sanctions on the PDA as an agency, and
18 not on the individual attorneys requesting extensions. In its order denying the most recent
19 motion for extension, this Court expressed that it does not question the assigned attorney's
20 diligence. It is clear that the delays in this case, and other cases in a comparable position,
21 are not due to any sanctionable conduct on the part of individual attorneys. Imposing
22 sanctions on individual attorneys could only exacerbate turnover, staffing shortages, and
23 appellate delay.

24
25 ⁶ See *Tobey v. Superior Court, Third Judicial Dist. At Anchorage* 680 P.2d 782, (Alaska
26 1984) (Court imposed fine of \$200 per day on attorney as sanction for his lack of
27 preparedness for trial in client's dissolution action, and attorney appealed. The Alaska
28 Supreme Court held that: (1) the court had authority to impose sanctions, but (2) the court
was required to provide the attorney with opportunity to show cause why sanctions were
not warranted.).

1 **C. The backlog of cases and staffing shortages caused by the COVID-19 pandemic**
2 **constitute extraordinary circumstances that weigh in favor of granting the**
3 **requested extension.**

4 The COVID-19 pandemic has created an immense backlog of criminal cases. This
5 is in large part due to the suspension of jury trials. The following data was obtained from
6 the court system in August:⁷

- 7 • As of August 1st, the total number of post-indictment felony cases pending in the
8 court system was: 2021 – **4,660**; 2019 – **3,528**; 2018 – **2,778**. This means that from
9 August 1, 2018 to August 1, 2021 there has been a **68% increase** in the number of
10 pending post-indictment felony cases.
- 11 • As of August 1st, the total number of pending pre-indictment felony cases pending
12 in the court system was: 2021 – **2,732**; 2019 – **1,375**; 2018 – **1,456**. This means that
13 from August 1, 2018 to August 1, 2021 there has been a **88% increase** in the number
14 of pending pre-indictment felony cases. This is despite a 6% decrease experienced
15 between 2018 and 2019.
- 16 • The Anchorage post-indictment numbers are: 2021 – **1,529**; 2019 – **1,217**; 2018 –
17 **894**. This means Anchorage experienced a **71% increase** in pending post-
18 indictment felony cases since 2018.
- 19 • The Anchorage pre-indictment numbers are: 2021 – **1,740**; 2019 – **665**; 2018 – **811**.
20 This means Anchorage experienced a **114% increase** in pending pre-indictment
21 cases since 2018. This is despite a 18% decrease in cases between 2018 and 2019.

22 OPA is presenting these numbers to help the Court of Appeals understand the
23 immense pressure being felt by OPA and PDA attorneys.⁸ OPA declines to add detailed

24
25 ⁷ This data was sent to OPA, PDA, and Department of Law via email by Stacey Marz,
26 Administrative Director, on August 23, 2021, in two PDF files.

27 ⁸ This Court should be aware that defense attorneys are incredibly busy despite the
28 suspension of jury trials. Trial attorneys are managing ballooning caseloads with ever-
increasing demands for client communication, discovery review, motion work, hearings,
bail requests, attempts at plea negotiations, and more. Much of this has become

commentary regarding the PDA’s internal practices and whether they could be done more efficiently. But the data does help explain why the PDA may choose to allocate appellate resources to trial work, including having appellate attorneys cover trials, act as second-chair counsel at trials, and handle trial-related pleadings and petitions for review.⁹

Additionally, there is a statewide labor shortage in all sectors.¹⁰ Attorneys are no exception. Both OPA and the PDA have been struggling to fill vacancies as they arise. Thus, both agencies are attempting to prevent attrition to the greatest extent possible. Otherwise, there can be a devastating chain reaction where attorneys who are demoralized begin to leave. That can lead to a snowball effect as the remaining attorneys are faced with absorbing the cases left by their departed colleagues. Thus, it is reasonable for the PDA to have concerns about its attorneys’ workload.

In denying the PDA’s requested extension this Court indicated that “the ordinary press of business and resource shortages at the Public Defender Agency are not ‘extraordinary and unforeseeable circumstances’ justifying an extension of time beyond the limit of Standing Order No. 12”¹¹ But we now find ourselves in the midst of a “extraordinary and unforeseeable” global pandemic; a pandemic which has disrupted virtually every aspect of our lives – including the criminal justice system and worldwide labor markets. The PDA’s request for more time is not based on the “ordinary press of business and resource shortages.” It would have been challenging to tackle the agency’s appellate backlog under ordinary circumstances. The current situation has created almost insurmountable difficulties. Despite that, the PDA has managed to increase its productivity and reduce the backlog of appellate cases.¹² That is a commendable accomplishment.

increasingly problematic due to the mounting frustration about the suspension of Rule 5 and Rule 45.

⁹ See Order dated 10/1/2021 at 3; State’s Opposition to Motion to Permit Withdrawal and for Appointment of Conflict-Free Counsel at 5-6.

¹⁰ <https://www.adn.com/business-economy/2021/08/28/burnout-city-the-labor-shortage-has-dragged-on-and-alaska-workers-and-businesses-owners-are-exhausted/>

¹¹ Order dated 10/1/2021.

¹² PDA Motion at 6-7.

Office of Public Advocacy’s Response to Court’s Order

Donnelly v. SOA, A-13597 & A-13598

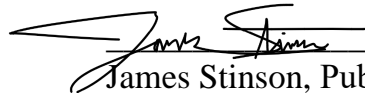
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Appellate Rule 503.5 defines what factors an appellate court should consider in determining whether extraordinary and compelling circumstances exist: the nature and foreseeability of the intervening events, pre-existing commitments, the extent of the party's or attorney's control over the circumstances that prevent completion of the brief, the nature of the case, and any prejudice to the parties.¹³ These factors weigh strongly in favor of granting the extension.

D. Conclusion

OPA thanks the Court for providing an opportunity to be heard. The entire criminal justice system is facing unique and ongoing challenges. There are no easy answers or quick fixes. But reassigning the case to OPA is not a viable option: it would clearly violate OPA's enabling statute and would lead to greater delay. This Court should grant the PDA's request for an extension, with or without sanctions to the PDA as an agency, or pursuant to Admin. Rule 12(e) reassign the case to counsel who can meet an earlier deadline.

OFFICE OF PUBLIC ADVOCACY



James Stinson, Public Advocate
Alaska Bar No. 1311089

CERTIFICATE OF SERVICE AND TYPEFACE

The undersigned hereby certifies that on November 11, 2021 the foregoing utilizes Times New Roman 13-point font and was electronically served on: S. Barr, D. Wendlandt, T. DeLucia

By: 

¹³ Appellate Rule 503.5(c)(2) *Motion for Non-Routine Extension Based upon a Showing of Extraordinary and Compelling Circumstances*.

In the Court of Appeals of the State of Alaska

Carlton W. Donnelly,
Appellant,

v.

State of Alaska,
Appellee.

Court of Appeals Nos. **A-13597**
and **A-13598**

Order

Motion to Permit Withdrawal of
Counsel

Date of Order: **11/3/2021**

Trial Court Case No. **3AN-11-13926CR**

Before: Wollenberg, Harbison, and Terrell, Judges

Carlton W. Donnelly is represented by the Alaska Public Defender Agency. The Agency, on behalf of Donnelly, previously filed three requests for extensions of time to file the opening brief in each of these appeals.

In Case No. A-13597, we granted the first two of these requests, allowing the Agency both a full 390-day extension under Court of Appeals Standing Order No. 12 and a second 150-day extension. But we denied the Agency's third request for an extension of time. At present, Donnelly's opening brief is due on November 5, 2021 — 540 days after the original filing deadline.

In Case No. A-13598, we similarly granted the Agency's first extension request, allowing a full 390-day extension under Standing Order No. 12. And we also granted, in part, the Agency's second extension request, allowing it an additional 90 days to file its opening brief. But we largely denied the Agency's third request for an extension of time, extending the due date in Case No. A-13598 by only 39 days, to match the due date in Donnelly's other appeal. Thus, Donnelly's opening brief in Case No. A-13598 is now also due on November 5, 2021 — 519 days after the original filing

deadline.

In response to our orders denying, in whole or in part, the Agency's third requests for extensions of time to file the opening briefs in these cases, the Agency filed a motion to withdraw from its representation of Donnelly. In its motion, the Agency asserts that it does not have the resources to comply with the briefing deadline in these cases and also provide effective representation to Donnelly and its other clients. According to the Agency, if the briefing deadline remains in place, there is a significant risk that its representation of one or more clients will be materially limited by its responsibilities to Donnelly — that is, the Agency will have a concurrent conflict of interest under Alaska Rule of Professional Conduct 1.7(a)(2). It therefore asks this Court to permit the Agency to withdraw from its representation of Donnelly in these cases, if the briefing deadline is not otherwise extended.

The State opposes the Agency's motion to withdraw.¹

Several courts have recognized that the caseload of a public defender may become so excessive that a conflict of interest is created.² We acknowledge that the Agency's pleadings indicate that it has experienced a significantly increased number of

¹ We invited the Office of Public Advocacy (OPA) — the agency responsible for assuming representation of a criminal defendant when the Public Defender Agency has a conflict of interest — to respond. OPA does not take a formal position on the motion to withdraw, but rather argues that we should grant the Agency's extension request. OPA further contends that, if the Agency is allowed to withdraw, this Court should appoint counsel under Administrative Rule 12(e) rather than transfer the case to OPA.

² See, e.g., *In re Ord. on Prosecution of Crim. Appeals by the Tenth Jud. Cir. Pub. Def.*, 561 So.2d 1130, 1135 (Fla. 1990); *U.S. ex rel. Green v. Washington*, 917 F.Supp. 1238, 1275 (N.D. Ill. 1996).

child-in-need-of-aid appeals this calendar year, and we also acknowledge that these appeals must be handled on an expedited basis.³ It appears that this increase in child-in-need-of-aid appeals has resulted in a concomitantly sizeable increase in requests for extensions beyond Standing Order No. 12 and has exacerbated what was already an intractable problem with respect to briefing delays in the Agency’s criminal appeals.⁴ However, even if the Agency’s current workload renders it unable to provide effective representation to all its appellate clients — an assertion the State disputes⁵ — we are unwilling to grant it the relief the Agency requests in these cases.

Our decision is driven by two primary concerns. First, we agree with those courts that have concluded that the problem of excessive caseload in a public defender office should be resolved at the outset of representation, rather than at some later point in the proceeding.⁶ In the present case, Donnelly’s appeals have been pending for over 500 days. We presume that the Agency has an established attorney-client relationship with Donnelly and that it has at least a general understanding of the record and the issues

³ Alaska R. App. P. 218(a)(3) & (h).

⁴ We acknowledge the progress the Agency has made in the last year on reducing its lengthy criminal appellate backlog. We also acknowledge that the Agency’s appellate attorneys produce high quality briefing that is of great value to this Court. But in spite of this, we conclude that the delay in this case is excessive.

⁵ The State questions whether the Agency’s briefing delays are solely the result of an excessive caseload. For the reasons stated, we need not resolve that question in this case. We note, however, that resolution of such a factual dispute would require an evidentiary hearing and would not be resolved simply by weighing the parties’ competing assertions.

⁶ See, e.g., *Pub. Def., Eleventh Jud. Cir. of Fla. v. State*, 115 So.3d 261, 270 (Fla. 2013); *Escambia Cnty. v. Behr*, 384 So.2d 147, 150 (Fla. 1980) (England, C.J., concurring).

that are presented by this appeal. If we permit the Agency to withdraw, Donnelly's new attorney would have to re-do the work that Agency has already completed, and the filing of Donnelly's appeal would be delayed even further.⁷

Indeed, we question whether it is the Agency's representation of Donnelly in these cases that is causing it to choose between the rights of its various clients. The Agency asserts that its conflict of interest developed only recently — when this Court denied its motions for an extension of time to file the opening briefs — and that this Court can avert the conflict by extending the deadline, as it had requested. But if this is the case, the Agency can similarly avert the conflict by seeking relief in its newer cases. Moreover, the affidavits that accompanied the extension requests in this case indicated that, at the time of the requested extensions, the assigned attorney was completing the opening brief in *Sadowski v. State*, Case No. A-13445, and that the attorney would then begin working on these cases. Since the opening brief in *Sadowski* has now been filed, we assume that the Agency is currently prioritizing the briefs in Donnelly's cases.

Our second concern is that the Agency's claimed conflict of interest apparently implicates a large number of the Agency's cases. Where a defense agency is experiencing a system-wide inability to provide effective representation to its clients, courts should not address the problem piecemeal, on a case-by-case basis. A piecemeal

⁷ The Agency asserts that, by denying the requested extensions, this Court may be causing Donnelly stress and uncertainty. But the Agency does not indicate that it has spoken with Donnelly about the briefing extensions and does not claim to know Donnelly's position on this matter. Certainly, further delay is unlikely to benefit Donnelly. Moreover, if Donnelly is experiencing stress, there is no reason to believe that the cause of this stress is this Court's enforcement of its published briefing deadlines, rather than the Agency's briefing delays.

approach “wastes judicial resources on redundant inquiries”⁸ and may clog the courts with myriad individual motions to withdraw. Indeed, the cases cited by the Agency in support of the premise that an excessive caseload can cause a conflict of interest generally involved broad-based orders that applied to a class of cases, rather than orders appointing conflict counsel for a single defendant.⁹ In those cases, the courts recognized judges’ inherent authority and responsibility to manage their dockets in a way that reduces delay, respects the statutory and ethical obligations of defense attorneys, and protects both the public and the constitutional and statutory rights of defendants.¹⁰

In short, we decline to allow the Agency to obtain over a year and a half of briefing extensions, and then be permitted to withdraw when an additional extension request is denied. Such a system would effectively authorize endless briefing extensions and lead to unacceptable appellate delay.

Upon consideration of the Public Defender Agency’s motion to withdraw from Donnelly’s appeals, the State’s opposition, and the response filed by the Office of Public Advocacy, the motion to withdraw or extend time is DENIED.

Entered at the direction of the Court.

⁸ *Pub. Def., Eleventh Jud. Cir. of Fla.*, 115 So.3d at 274.

⁹ *See State ex rel. Missouri Pub. Def. Com’n v. Waters*, 370 S.W.3d 592 (Mo. 2012); *Pub. Def., Eleventh Jud. Cir. of Fla.*, 115 So.3d 261; *see also U.S. ex rel. Green v. Washington*, 917 F.Supp. 1238 (N.D. Ill. 1996); *In re Ord. on Prosecution of Crim. Appeals by the Tenth Jud. Cir. Pub. Def.*, 561 So.2d 1130 (Fla. 1990).

¹⁰ *State ex rel. Missouri Pub. Def. Com’n*, 370 S.W.3d at 598; *Pub. Def., Eleventh Jud. Cir. of Fla.*, 115 So.3d at 281.

Wollenberg, J., dissenting in part.

I agree with the Court’s decision denying the Agency’s motion to withdraw. I also agree with the principles articulated in the lead order. I fail to see how withdrawing from two appeals that have been pending for over 500 days serves Carlton Donnelly, or systemically addresses the problem of appellate delay.

That said, the pleadings suggest that the Public Defender Agency has made significant progress in the last year in reducing its criminal appellate backlog. According to the statistics provided by the Agency, between 2017 and early 2020, the Agency’s criminal appellate backlog grew exponentially — from 17 cases to over 120 cases. Since then, under the leadership of a new appellate supervisor, the Agency has apparently cut that backlog by more than half.

This calendar year, the Agency has had a significant influx of child-in-need-of-aid appeals. According to the Agency’s motion to withdraw, it assigned 24 child welfare appeals to staff attorneys between January 1 and October 15. If the child-in-need of aid appeals continue at that rate, the Agency will have 30 child-in-need-of-aid appeals by the end of this year — a historically high number. It is not surprising that, as a result of those appeals, the Agency has had even greater difficulty meeting its deadlines in its criminal appeals.

There is no easy answer to the problem of appellate delay. Denying extension requests puts incredible stress on individual attorneys, who are not the source of the Agency’s backlog. But granting the requests reduces the pressure of a deadline, provides little incentive for the allocation of additional resources, and ultimately, does not advance our common goal of reducing appellate delay.

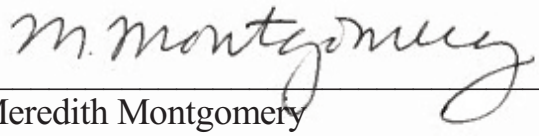
The Court's frustration in these particular cases stemmed largely from the lack of *any* apparent progress in these appeals at the time of the most recent requested extensions, or any recognition of how long the cases had been pending without even a cursory review of the record and tentative identification of issues that could allow an attorney to give a realistic sense of how long the briefs might take. Given the prior extensions beyond Standing Order No. 12 that we had already granted, it was surprising to see so little explanation offered for why those extension requests had so missed the mark. If the appellate delay in these cases is indeed an Agency problem, one would expect to see in the extension requests the kind of information the Agency only later included in its motion to withdraw.

Since we denied the extension requests in these cases, however, the Agency appears to have dedicated increased funding to appellate contracting. Currently before the Court are motions in at least nine criminal appeals, in which the Agency has identified an outside attorney with whom it plans to contract. In its motion to withdraw from Donnelly's appeals, the Agency notes that the appeals that remain to be handled by staff attorneys — after other appeals have been contracted — tend to have more substantial records.

Given the increased resource allocation to appellate contracts, the downward trajectory of the backlog, and our recognition in this case of the diligence of the assigned attorney, I would grant the extensions requested in this case, but order no further extensions. I note, however, that I would be unlikely to grant future extension requests of this nature and would also consider sanctions against the Agency for failing to meet future briefing deadlines.

Donnelly v. State – p. 8
File Nos. A-13597/98 – 11/3/2021

Clerk of the Appellate Courts


Meredith Montgomery

cc: Renee McFarland, Public Defender Agency
James Stinson, Office of Public Advocacy
Tamara DeLucia, Office of Criminal Appeals

Distribution:

Email:
Barr, Sharon, Public Defender
Wendlandt, Diane L.

ALASKA PUBLIC DEFENDER AGENCY
Renee McFarland, Deputy Public Defender
900 W 5th, Ste. 200 Anchorage, AK 99501
Phone: 907.334.2670 | Fax: 907.334.4440
Email: renee.mcfarland@alaska.gov

IN THE SUPREME COURT OF THE STATE OF ALASKA

ALASKA PUBLIC DEFENDER
AGENCY,

Applicant,

v.

Supreme Court No. S-_____

ALASKA COURT OF APPEALS,

Respondent.

Trial Case No. 3AN-11-13926CR and
3AN-14-08520CR
Court of Appeals No. A-13597 and A-
13598

AFFIDAVIT OF COUNSEL

VRA AND APP. R. 513.5 CERTIFICATION

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court. I further certify, pursuant to App. R. 513, that the font used in this document is Arial 12.5 point.

STATE OF ALASKA)
) ss
THIRD JUDICIAL DISTRICT)

Renee McFarland swears:

1. I am the supervisor of the Alaska Public Defender Agency's appellate section, which is assigned to represent Mr. Donnelly in these appeals. Sharon Barr is the lawyer the agency has assigned to represent Mr. Donnelly in his appeals.

2. After Ms. Barr filed her opening brief in *Sadowksi v. State*, she began working on Mr. Donnelly's case. She is currently reviewing the record and transcripts in those cases. In her review, Ms. Barr determined that she needed to review hearings that had been sealed by the trial court to determine whether they were relevant to the points on appeal.

3. On October 28, Ms. Barr filed a motion with the court of appeals, asking that she be permitted to review the audio recordings. To comply with her ethical and constitutional obligations, Ms. Barr must review these hearings before filing any brief in Mr. Donnelly's cases; the court of appeals, however, has not yet ruled on Ms. Barr's motion.

4. In the course of her work in Mr. Donnelly's case, Ms. Barr has complied with her obligations under Alaska Professional Conduct Rule 1.4(a) to keep Mr. Donnelly informed of the status of his case, including the litigation regarding the deadlines for filing the opening briefs.

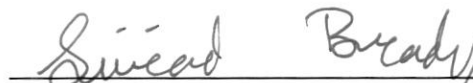
5. I have oral argument scheduled before this court on November 9 in a consolidated petition for review in child welfare cases. I will be unable to begin working on the agency's original application until after this argument.


RENEE McFARLAND (0202003)
DEPUTY PUBLIC DEFENDER

Subscribed and sworn to before me on:

November 4th, 2021




Notary Public in Alaska
Commission expires with office